In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-411

CARL MARTIN BRANDENFELS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the trial court abused its discretion in refusing to continue his trial so that he might secure the presence of a witness then outside of the United States, and (2) that the trial court improperly refused to admit into evidence certain out-of-court statements made by that same witness.

After a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted on seven counts of aiding and abetting co-defendants Kenneth Grove and Robert Gnapp in the embezzlement and wilful misapplication of approximately $1.5 million belonging to a federally insured savings and loan association, in violation of 18 U.S.C. 657; and of conspiracy to perform these unlawful acts, in violation of 18 U.S.C. 371.[1] He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed in a written opinion on June 30, 1975 (Pet. App. A), and a petition for rehearing was denied on August 13, 1975. The petition for a writ of certiorari was not filed until September 15, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason to grant the writ.

The facts are set forth in the opinion of the court of appeals (Pet. App. A-2—A-5), and may be summarized as follows. In late 1969 Kenneth Grove purchased Northwest Guaranty Savings and Loan Association, located in Seattle, Washington. Petitioner assisted in the negotiations which led to this purchase

[1] Petitioner, Grove and Gnapp were charged in fifteen counts of a twenty-count indictment. In addition to the embezzlement and conspiracy charges, all three were charged in five counts with fraud in the offer and sale of securities (certificates of deposit), in violation of 15 U.S.C. 77q(a); and in two counts of falsely making and counterfeiting instruments issued by a savings and loan association, in violation of 18 U.S.C. 493. Only Grove and Gnapp were named in the five remaining counts.

and, thereafter, became active in the operations of Northwest Guaranty.

Between January, 1970, and January, 1971, petitioner purchased over $6,000,000 in "brokered funds"[2] for deposit in Northwest Guaranty. A portion of each installment was first used to purchase certificates of deposit for the investors who had contributed the funds, and thereafter to satisfy Northwest Guaranty's obligations to the contributing investors of the previous installment. The remainder was either deposited at Northwest Guaranty or diverted to the personal use of petitioner and Gnapp or both.

In January, 1971, following an investigation by the Federal Home Loan Bank Board, the flow of brokered funds to Northwest Guaranty ceased, leaving shortages totalling approximately $800,000 caused by the diversions outlined above. Faced with this emergency, Grove engineered, by a series of false entries on Northwest Guaranty's books, the disbursal of approximately $1.5 million of Northwest Guaranty funds. These were the subject matter of

[2] The court of appeals explained a typical brokered funds arrangement as follows:

> Money brokers obtain funds from depositors by paying them a "bonus" for placing money with the broker rather than directly into a savings institution. In return for a fee of about 3% of the deposit, the broker then sells the aggregate funds of many investors to persons for deposit in a lending institution. The institution then issues certificates of deposit directly to the individual investors. [Pet. App. A-2—A-3]

six of the embezzlement counts. Approximately $1.1 million of these funds were traced directly to petitioner and co-indictee Gnapp.[3]

In May, 1971, Grove fled to Brazil when it became apparent that his misconduct as president of Northwest Guaranty was about to be discovered. In June, 1971, petitioner and his then attorney, Thomas Murphy, traveled to Sao Paulo, Brazil, to interview Grove. His attorney there tape-recorded a conversation during which Grove made a short statement concerning Northwest Guaranty, in which he said (R. 96)[4]:

> * * * I will not go into detail because the material is too lengthy to cover on tape. * * * None of those people that are currently being interrogated by various federal agencies were in any way involved in any of those questionable transactions and I refer specifically to Martin Brandenfels, Robert Gnapp [and others] * * * Mr. Brandenfels was a mortgage loan customer as was Mr. Gnapp. As far as any of these people having any knowledge about how money was originated, who, in some cases the lenders were, other than NWG, the only person that has knowledge of those facts is me * * *.

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[3] The government presented evidence showing that petitioner and Gnapp used this money primarily to cover the $800,000 brokered funds shortage. Petitioner was also convicted on an additional embezzlement count involving a $40,000 disbursal on November 30, 1970 (Pet. App. A-3).

[4] "R." refers to the record on appeal in the court of appeals.

Petitioner did not deny his active participation in the affairs of Northwest Guaranty during Grove's presidency, the fact that Grove had in effect stolen $1.5 million of Northwest Guaranty's deposits, or his receipt from Grove of approximately $1.1 million of these stolen proceeds. However, petitioner did deny any knowledge of the illicit source of those funds. Petitioner testified that he thought the money in question came through a one million dollar credit line which Grove had arranged for him with a concern called Western Investors and for which he had signed notes, mortgages, and deeds of trust as security. Grove did not record any of these security interests, however, and petitioner admitted that he had not retained copies of any of those documents he claimed to have executed in favor of Grove.

1. On October 4, 1972 petitioner, along with Gnapp and Grove, was indicted (R. 1). His trial was set for December 18, 1972, but was continued until June 11, 1973. On May 30, 1973, petitioner requested a continuance of 90 to 120 days so that he might secure Grove's testimony at his trial in support of his defense of non-involvement in the Northwest Guaranty embezzlement scheme (Pet. App. A-5). Grove at that time had been the subject of extradition proceedings in Brazil since December 1972 (Pet. App. A-4).[5] Petitioner contends due process required granting of this motion.

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[5] Grove was not returned to the United States until mid-October 1973 and petitioner's trial was concluded on July 6, 1973.

The decision to deny a motion for a continuance rests within the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of abuse. *United States* v. *Cawley*, 481 F. 2d 702 (C.A. 5); *Powell* v. *United States*, 420 F.2d 799 (C.A. 9). When weighing the merits of a continuance request designed to secure the presence of a witness then outside the jurisdiction of the court, the court is entitled to assess both the probability that the absent witness can be located and brought to the trial within a reasonable time, and the likelihood that the witness once present will provide the testimony sought by the moving party. *United States* v. *Cawley, supra; McConney* v. *United States*, 421 F.2d 248 (C.A. 9); *Powell* v. *United States, supra; Smith* v. *United States*, 273 F.2d 462 (C.A. 10); *United States* v. *Gloria*, 494 F.2d 477 (C.A. 5). In addition, the court may consider the diligence of the moving party. *Natvig* v. *United States*, 236 F.2d 694 (C.A. D.C.), certiorari denied, 352 U.S. 1014; *Burton* v. *United States*, 175 F.2d 960 (C.A. 5).

As the court of appeals, on whose opinion we rely, concluded (Pet. App. A-5—A-6):

> In view of the detailed nature of the investigation, the extensive trial preparation required of the government, and the number of witnesses expected to be called, the motion for continuance was made fairly late in the proceedings. Meanwhile the defense, having known of Grove's whereabouts and the potential difficulty in securing his presence at trial, had made no motion

> to take his deposition although this was a possible course of action under Rule 15 of the Federal Rules of Criminal Procedure. Furthermore, there were no assurances that Grove, even if available, would waive his Fifth Amendment privilege against self-incrimination in order to testify for Brandenfels. And even if it could be assumed that Grove, upon his eventual return would agree to testify, from the standpoint of the trial judge, the proffered testimony consisting of acceptance by Grove of sole blame for misdeeds at Northwest Guaranty must have appeared somewhat suspect in view of Gnapp's plea of guilty on one count of the indictment, albeit a count in which Brandenfels was not charged.

This analysis correctly applies the relevant factors to the particular facts of this record, and there is no reason for further review.[6]

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[6] The alleged conflict with two decisions of the Court of Appeals for the District of Columbia Circuit is illusory. In *J. E. Hanger, Inc.* v. *United States*, 160 F.2d 8 (C.A.D.C.), the appellant's motion for a continuance of relatively short duration (two days) came when the government abruptly ended its case after only two days, contrary to its previously announced expectation that its presentation would take at least ten days and after the trial judge had expressed willingness during the pre-trial conference to continue the trial for up to two weeks should defense counsel need the extra time to line up his witnesses. The decision in *Gilbert* v. *Lachapelle*, 127 F.2d 750 (C.A.D.C.), actually undermines petitioner's argument. In *Gilbert*, evidence which was indispensable to appellant's case was in the possession of another court trying a related suit. Appellant refused appellee's offers to photograph the critical exhibits for his use and declined an offer by the trial judge to intervene personally with the judge of

2. Petitioner also characterizes Grove's tape-recorded statement exonerating petitioner as a declaration against penal interest and argues that the trial court's exclusion of that statement as inadmissible hearsay denied him due process, contrary to *Chambers* v. *Mississippi*, 410 U.S. 284, where the Court ruled that hearsay testimony regarding confessions of a third person should have been admitted.

However, as the court of appeals concluded, *Chambers* is distinguishable. First, Grove's statement was directed only to petitioner's role in the affairs of Northwest Guaranty. He purported to exonerate petitioner in conclusory terms; he did not thereby directly incriminate himself. It therefore was not "in a very real sense self-incriminatory and unquestionably against interest" and, thus, does not even contain the threshold indicia of reliability which motivated this Court's detailed factual inquiry in *Chambers*, *supra*, 410 U.S. at 301.

Second, the third party confessions sought to be introduced in *Chambers* had been made spontaneously on three separate occasions to three different individuals, and the substance of each confession had been corroborated by some other evidence in the case. In contrast, Grove's statement exonerating petitioner

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the other court on appellant's behalf. Upholding the trial judge's subsequent denial of appellant's motion for a continuance, the court of appeals specified appellant's failure to take the opportunities afforded by appellee and the trial judge to secure the evidence by alternative means as the critical factor in its decision.

was elicited during questioning by petitioner's own attorney, and there was no evidence, with the exception of petitioner's own testimony, to support petitioner's claim of non-involvement in the Northwest Guaranty embezzlement scheme. Indeed, co-defendant Gnapp testified that he had never heard of Western Investors or petitioner's asserted credit arrangement with Grove and petitioner did not produce any trace of the notes and mortgages he supposedly executed in Grove's favor to document the occurrence of this credit transaction.

In short, Grove's statements were not "originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." [7] 410 U.S. at 300. Finally, unlike *Chambers*, the declarant was not in court at the time and subject to cross-examination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[7] Under the Federal Rules of Evidence, Rule 804(b)(3), which became effective after petitioner's trial, the statement would have been inadmissible, as the court below held, because of the absence of corroborating circumstances that "clearly indicate[d] the trustworthiness of the statement" (Pet. App. A-8).

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